

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NOE ALEXANDER SAGASTIZADO

Claimant

VS.

IBP, INC.

Self-Insured Respondent

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Docket No. 1,000,297

ORDER

Claimant requested review of the January 9, 2004 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on June 22, 2004.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent stipulated claimant suffered accidental injury arising out of and in the course of his employment on July 30, 2001. The disputed issue was the nature and extent of disability. Specifically, whether claimant was entitled to a whole body disability as a result of injuries to both his right shoulder and his neck, or was claimant limited to a scheduled injury to the right shoulder.

The Administrative Law Judge found the claimant suffered a 10 percent permanent partial scheduled disability to the right shoulder.

Claimant requested review and argues that the Board should adopt Dr. Pedro A. Murati's opinion that claimant suffered permanent impairment to his neck as well as his right shoulder. Consequently, claimant requests the Board determine that he suffered no less than a 10 percent permanent partial disability to the whole body.

Conversely, respondent requests the Board to affirm the ALJ's Award. Respondent argues that the opinions of the treating physician and court ordered independent medical examiner that claimant's disability is limited to his right shoulder is more persuasive than the testimony of claimant's medical expert. Consequently, respondent requests the Board affirm the ALJ's finding that claimant's disability is limited to a 10 percent permanent partial scheduled disability to the right shoulder.

The sole issue raised on review by the claimant is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out the relevant facts in detail. It is not necessary to repeat those herein. The Board finds the ALJ's factual findings to be accurate and adopts those findings as its own as if specifically set forth in this order.

Claimant's contention is that the ALJ's Award is inadequate because it failed to include Dr. Murati's rating to his neck. The involvement of the neck would make this a general body disability.

Claimant alleged that he suffered a gradual onset of pain not only in his shoulder but also his neck as he performed his job duties as a logger. Claimant testified that his neck pain was on the right side at the junction of his shoulder and neck. When claimant reported to the nurse's station at the plant he only mentioned he was having pain in his right shoulder.

Claimant initially received treatment from Drs. Terry J. Hunsberger and Michael J. Baughman who provided claimant with medications and two regimes of physical therapy. Claimant was then referred to Dr. Robert L. Eyster for additional treatment.

Dr. Eyster noted that claimant complained of shoulder pain. Following examination of claimant and review of an MRI of claimant's shoulder, the doctor diagnosed claimant with an impingement syndrome of the right shoulder. Upon examination of claimant, the doctor noted that he did not elicit pain complaints when he moved the claimant's neck in all directions. The doctor recommended an injection in claimant's shoulder as well as the possibility of arthroscopic surgery but the claimant declined those recommended

treatments. However at the next office visit the claimant agreed to proceed with the shoulder injection.

During his treatment with Dr. Eyster the claimant continued to complain of shoulder pain and agreed to proceed with the arthroscopic surgery on his right shoulder. But after surgery was scheduled it was later canceled. The doctor noted that during his examinations of claimant there was never any finding to base a diagnosis of injury to claimant's neck or upper back. Claimant had a full range of cervical motion without spasm in the neck or upper back musculature. And claimant never complained of neck pain.

At his attorney's request, the claimant was examined by Dr. Murati on August 27, 2002. The claimant complained of right shoulder and neck pain. The doctor diagnosed right shoulder pain secondary to rotator cuff strain and myofascial pain syndrome affecting the right shoulder, thoracic and cervical musculatures. According to the *AMA Guides*¹, the doctor rated claimant with an 8 percent right upper extremity for the right shoulder pain which the doctor converted to a 5 percent whole person impairment. For the myofascial pain syndrome affecting the neck, the doctor determined claimant suffered a 5 percent whole person impairment pursuant to DRE Cervicothoracic Category II. The ratings combined for a 10 percent permanent partial whole person functional impairment.

Because of the differing medical opinions and physical findings regarding claimant's neck, the ALJ ordered Dr. Vito J. Carabetta to perform an independent medical evaluation of claimant. Dr. Carabetta diagnosed claimant with right rotator cuff tendinitis with impingement syndrome. The doctor assessed claimant's impairment at 10 percent to the right upper extremity at the level of the shoulder. The doctor specifically noted that cervical area involvement was not identifiable upon claimant's examination as all of the complaints were to the right shoulder.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the fourth edition of the *Guides* unless otherwise noted.

² K.S.A. 44-501(Furse 2000) and K.S.A. 2001 Supp. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The resolution of this case depends upon whether claimant suffered scheduled or non-scheduled injuries as a result of his work-related accident on July 30, 2001. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.⁴ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁵

Drs. Eyster, a treating physician, and Carabetta, a court ordered independent medical examiner, concluded claimant only suffered permanent impairment to his right upper extremity at the level of the shoulder, a scheduled disability. But Dr. Murati determined claimant suffered permanent impairment to his cervical spine, a general body disability.

The ALJ concluded that claimant's neck was not injured as a result of claimant's work activities. The ALJ made this determination in part because Dr. Murati was the only physician to rate an injury to claimant's neck. To the contrary, both Drs. Eyster and Carabetta noted claimant did not complain of neck pain and their examinations of claimant's cervical spine resulted in normal findings.

Claimant initially complained of shoulder pain to the plant nurse. He then received treatment for his shoulder and later was referred to Dr. Eyster who noted claimant never complained of neck pain. Dr. Eyster specifically examined claimant's cervical spine and found full range of motion with no complaints of pain during his examinations. Dr. Carabetta, the last physician to examine claimant, also noted normal findings upon range of motion examination of claimant's cervical spine. Dr. Carabetta also specifically determined there was no cervical involvement. Lastly, Dr. Murati agreed that he only found limited range of motion upon extension but that cervical range of motion with flexion, lateral flexion and right and left rotation were normal. The Board agrees with the findings and conclusions of the ALJ that Dr. Carabetta's opinion is more persuasive. The Board affirms the ALJ's Award.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 9, 2004, is affirmed.

IT IS SO ORDERED.

⁴ K.S.A. 44-510d (Furse 2000); K.S.A.44-510e (Furse 2000).

⁵ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

Dated this _____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director